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Date Issued: August 20, 1999

Case No.: 1998-LHC-2101

OWCP No.: 06-171064

In the Matter of

RICHARD A. NEWBERN,

Claimant

v.

KENTUCKY MARINE CORP.,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Carrier.

APPEARANCES:

Thomas Osborne, Esquire
P.O. Box 995
Paducah, Kentucky 42002-0995
For the claimant

Grant Roark, Esquire
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For the employer/carrier

BEFORE: DONALD W. MOSSER
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, [33 U.S.C. § 901 *et seq.*], hereinafter referred to as the Act. The case was referred to the Office of Administrative Law Judges on May 22, 1998. (ALJX 1).

Following proper notice to all parties, a formal hearing was held on March 2, 1998, in Paducah, Kentucky. Exhibits of the parties were admitted in evidence at the hearing pursuant to 20 C.F.R. § 702.338, and the parties were afforded the opportunity to present testimonial evidence and to submit post-hearing briefs.[1]

The findings of fact and conclusions of law set forth in this decision are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered. References to ALJX, CX and EX pertain to the exhibits of the administrative law judge, claimant and employer, respectively.[2] The transcript of the hearing is cited as Tr. and by page number.

ISSUES

The following issues remain for resolution: (1) the nature and extent of Mr. Newbern's disability resulting from his work-related injuries; and, (2) the necessity of claimant's medical expenses.

FINDINGS OF FACT

Background

Claimant, Richard Newbern, was employed by Kentucky Marine Corporation as a barge cleaner helper. He injured his neck on July 5, 1995 while lifting a barge pump. Claimant was taken to a medical clinic for treatment following the injury. He reported for work during the

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[1]Employer's counsel filed an objection to claimant's brief, objecting to portions of the brief which refer to the deposition of Dr. Steven Reiss and requesting that Dr. Reiss' deposition be stricken from evidence. As the deposition of Dr. Reiss was specifically admitted into evidence at the hearing as Claimant's Exhibit E, the employer's motion is denied. (Tr. 9). Moreover, I find the arguments regarding the claimant's brief go to the weight to be given to Claimant's Exhibit E, not its admissibility.

[2]Pursuant to agreement at the hearing, CX G, which is an itemization of Mr. Newbern's medical expenses, was submitted post-hearing. As the employer filed no objections to the admission of this evidence in response to the Order dated April 14, 1999, IT IS HEREBY ORDERED that the exhibit is admitted in evidence.

week after the accident, but was unable to work due to the injury. Claimant experienced pain in the left side of his neck and down his shoulder into his left arm. He returned to the medical clinic and was referred to Dr. John Noonan, a neurosurgeon. Dr. Noonan recommended surgery and claimant sought a second opinion from Dr. Steven Reiss in Louisville, Kentucky. (Tr. 11-12, 27-28; EX 1).

The medical records of Dr. Reiss indicate claimant was first seen by the physician on September 26, 1995 with complaints of pain in the neck, left shoulder and low back. Dr. Reiss diagnosed a herniated disc at C5-C6 and Mr. Newbern underwent an anterior cervical diskectomy surgery in October 1995 for this condition. The physician indicated the surgery helped some, but the patient's complaints of pain in the left arm continued.

The records of Bruce Amble, Ph.D., who is a psychologist, indicate Mr. Newbern was referred to him for a psychological assessment on October 3, 1995 to determine the claimant's eligibility for Social Security disability benefits. Dr. Amble indicated in a functional capacity assessment form that the claimant's abilities are moderately limited in understanding and remembering detailed instructions, carrying out detailed instructions, maintaining attention and concentration for extended periods, and in performing activities within a schedule which require regular attendance and punctuality within customary tolerances. Other areas in which moderate limitations are noted include Mr. Newbern's abilities of completing a normal workday and workweek without interruptions from psychologically based symptoms, interacting appropriately with the general public, accepting instructions and responding appropriately to criticism from supervisors, getting along with co-workers and responding appropriately to changes in the work setting. It is also noted in the assessment that the claimant is not significantly limited in the remaining categories other than that he has depression and is moderately limited in activities of daily living and social functioning. The primary diagnosis made by Dr. Amble on the disability determination form is "affective (mood) disorders" and a secondary diagnosis of "disorders of Back, Discogenic and Degenerative." (CX C; EX 2).

Dr. Reiss' records also indicated that Mr. Newbern had a car accident in January of 1996. An x-ray was taken, as was an MRI and myelogram, which revealed a herniated disc at C5/6. Surgery was performed for that condition in April of 1996, which resolved the pain on the claimant's right side. Mr. Newbern continued to experience pain, numbness and weakness in his left upper extremity. He was referred by Dr. Thomas Spagnolia to Dr. Cyrus E. Bakhit of the Pain Management Center of Paducah, Kentucky, in October of 1996. He was discharged from that facility on January 14, 1997 after five visits for a home exercise program. The discharge summary pertaining to his treatment at that facility indicates that Mr. Newbern had a cervical range of motion below 60-70 percent of the population norm and that he continued to experience a high level of pain.

Dr. Reiss, who is Board-certified in neurological surgery, testified by deposition on September 11, 1997 regarding the two surgeries he performed on Mr. Newbern. He indicated claimant continued to experience pain on the left side which was probably due to permanent injury

to the nerve and that there is no treatment for the condition. Dr. Reiss stated that he began to feel claimant was at maximum medical improvement somewhere between six and twelve months after surgery. The physician testified that claimant's work-related restrictions included being able to only lift around fifteen to twenty pounds, and that claimant is unable to do any type of work which requires keeping his arms over his head or arms in one continuous position or anything that requires him to keep his neck bent for a period of time. Dr. Reiss also testified that he reviewed claimant's other medical records and that a three-page chart attached to the deposition summarizes the medical bills relating to claimant's work-related injury. (CX E).

Dr. Cyrus Bakhit, who is Board-certified in internal medicine, anesthesiology and pain management, testified by deposition on June 24, 1998 regarding his treatment of Mr. Newbern. The physician indicated claimant's first visit was on October 30, 1996 and Mr. Newbern is still under his treatment. A comprehensive initial evaluation, including a physical and psychological evaluation, was performed on claimant's first visit, along with a physical therapy consultation. The physician testified that one-hundred percent of claimant's symptoms today are related to his work injury and claimant's dysfunction is a result of pain. Dr. Bakhit stated that in his opinion, claimant is unable to return to his former position as a barge cleaner and will be unable to perform such work in the future. The physician stated that claimant can perform moderate (50 pounds) to light lifting, but is not able to do heavy lifting or moderate repetitive lifting. Dr. Bakhit indicated Mr. Newbern is able to do light work, not requiring a lot of repetitive movements and without a lot of vibration or activity of the neck since his range of motion is restricted. (CX D).

Mr. Newbern testified at the hearing that he is unable to return to his previous employment as a barge cleaner. He stated that there has not been a time since the work-related accident that he has been completely pain free. He acknowledged that he has not returned to his former job, nor has he applied for any other work after his injury. Claimant indicated he has not sought work because he has no initiative to do so and that he is not interested in working with a vocational rehabilitation counselor to help him return to work. Mr. Newbern testified that he suffers from depression and first sought care for this condition after his first surgery in October 1996. He stated that he is currently seeing Dr. Ben Parker for his depression and is taking Prozac for depression and Sinequan to help him sleep. (Tr. 28, 40-44, 53, 60; CX D). Unfortunately, the record does not contain any medical records pertaining to the treatment of Dr. Parker, or his predecessor, of Mr. Newbern's mental condition.

A vocational rehabilitation counselor testified by deposition for the employer regarding Mr. Newbern's ability to find alternate employment. The counselor met with claimant on September 2, 1998. He also reviewed the medical records of Dr. Reiss, Dr. Noonan and Dr. Bahkit, a psychological report, social security records, a job description and the depositions of Mr. Newbern and Dr. Bahkit. He also performed academic testing on claimant and determined Mr. Newbern was at a high school or GED level of functioning. Based on this information, the vocational expert determined claimant retains access to about seventy-one percent of the labor market based on restrictions identified in the records. He found three areas in which Mr. Newbern is restricted. First, he is excluded from any jobs requiring lifting over fifty pounds

maximum. Second, claimant is excluded from any jobs requiring repetitive lifting or motions in the neck area. Third, the counselor found claimant should be excluded from any jobs requiring a large amount of concentration or socialization. He discussed several areas of jobs which would be appropriate for claimant and the number of those types of jobs in the local labor market. He also performed a survey of typical places of employment in the area. The vocational expert stated the labor market in the area is extremely strong and that he had little trouble locating available jobs. He determined claimant has entry level skills and an earning potential in the $5.15 to $7.00 an hour wage structure, with the possibility of a few jobs in the $8.00 to $10.00 range. This determination was made based on state statistics of actual jobs in the Paducah area and a labor market survey. Based on his review of the job market in claimant's area, the vocational rehabilitation counselor determined claimant did not suffer a loss in wage earning capacity. Attached to the expert's deposition is a list of several types of actual job openings from the February 14, 1999 Courier Journal, a newspaper published in Louisville, Kentucky. The counselor also testified that he considered claimant's psychological condition when making his determinations. He noted that Mr. Newbern had made no attempts or effort to return to work. He stated that he has experience dealing with persons who have psychological problems and has had success in returning people to work with greater psychological problems than those of claimant. He indicated motivation was the key factor, not the level of disability. He testified that he has also worked with people who were suffering from depression and that depression is a treatable condition. The counselor testified that there is a dynamic of injury and disability in that being out of the work force creates a cycle of depression and anything that returns a person to a more typical, normative lifestyle ameliorates that depression, so that depression cannot be taken as an isolated illness. (EX 5).

Mr. Newbern filed his claim for compensation relating to the July 5, 1995 injury with the U.S. Department of Labor on September 9, 1996. (EX 3). Kentucky Marine Corporation paid Mr. Newbern $195.62 per week from July 12, 1995 through April 30, 1996, for a total amount of $8,215.62 in compensation payments relating to the July 5, 1995 accident. The employer also paid $20, 481.69 in medical expenses for the claimant through February 25, 1999. (ALJX 3, 4). Contained in the record are the claimant's medical bills and prescription costs through March 1, 1999. (CX A, F). Claimant's average weekly wage as of July 5, 1999 was $252.00. (Tr. 6; ALJX 3, 4).

Conclusions of Law

Nature and Extent of Disability

Richard Newbern seeks permanent total disability benefits under the Act for the injuries he suffered on July 5, 1995. *See* 33 U.S.C. § 908(a). As noted above, the evidence establishes that claimant sustained injuries, as defined under the Act, to his neck arising from his employment with Kentucky Marine Corporation. Therefore, the primary issue remaining for resolution is the nature and extent of any disability that is caused by his injuries.

Under the Act, "disability" is defined as the "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. § 902(10). Generally, disability is addressed in terms of its extent, total or partial, and its nature, permanent or temporary. A claimant bears the burden of establishing both the nature and extent of his disability. *Eckley v. Fibrex and Shipping Co.*, 21 BRBS 120, 122 (1988); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (1985).

Courts have devised two legal standards to determine whether a disability is permanent or temporary in nature. Under one standard, a disability is considered to be permanent where the underlying condition has reached the point of maximum medical improvement. *Trask*, 17 BRBS at 60. Under another standard, a permanent disability is one that "has continued for a lengthy period and . . . appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968). These two standards, while distinguishable, both define the permanency of a disability in terms of the potential for further recovery from the injury.

The parties have stipulated to February 11, 1997 as the date Mr. Newbern's condition reached maximum medical improvement. (ALJX 3, 4; Tr. 6-7). This stipulation is based on the report of Dr. Reiss in which the physician stated that the claimant was at maximum medical improvement for his injuries as of that date. (EX 1). As the stipulation is supported by reliable medical evidence from claimant's treating physician, I find claimant reached maximum medical improvement as of February 11, 1997. Thus, I find claimant suffers from a permanent disability as of that date.

The extent of disability is an economic concept. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). Thus, in order for a claimant to receive an award of compensation, the evidence must establish that the injury resulted in a loss of wage earning capacity. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 776 F.2d 1225, 1229 (4th Cir. 1985); *Sproull v. Stevedoring Servs. Of America*, 25 BRBS 100, 110 (1991). A claimant establishes a *prima facie* case of total disability by showing that he cannot perform his usual work because of a work-related injury. Once a *prima facie* case is established, the claimant is presumed to be totally disabled, and the burden shifts to the employer to prove the availability of suitable alternate employment. *See Turner*, 661 F.2d at 1038; *Trans-State Dredging v. Benefits Review Bd. [Tarner]*, 731 F.2d 199, 200-02 (4th Cir. 1984); *Elliott v. C & P Telephone Co.*, 16 BRBS 89, 92 (1984). If the employer establishes the existence of such employment, the employee's disability is treated as partial rather than total. However, the claimant may rebut the employer's showing of suitable alternate employment, and thus retain entitlement to total disability benefits, by demonstrating that he diligently sought but was unable to obtain such employment. *See Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 305, 312 (D.C. Cir. 1991). At his initial stage, the claimant is not required to establish that he can not return to any type of employment, but only that he is unable to return to his former employment. *Elliott, supra.*

Mr. Newbern testified that he is unable to return to the job he performed with Kentucky Marine before his injury. He described his job as involving a lot of strenuous work and requiring the lifting and moving of heavy objects. Claimant stated that his job involved climbing ladders and regular bending to pull full buckets out of the barges. He was required to regularly lift barge pumps and pump hoses, which claimant estimated weighed one-hundred-twenty to one-hundred-forty pounds. Claimant's testimony is supported by the physicians who treated him. Dr. Bahkit indicated in his deposition that claimant is unable to return to his pre-injury employment and will be unable to perform such work in the future. Dr. Reiss limited claimant to a work restriction of lifting only around fifteen to twenty pounds. All the evidence of record supports Mr. Newbern's assertion that he is unable to return to his pre-injury employment. Thus, I find claimant has met his burden of establishing total disability by evidence that he cannot perform his usual work due to a work-related injury.

In order to overcome the presumption of total disability, the employer must demonstrate the availability of employment that the claimant could perform. A showing of suitable alternate employment must account for a claimant's age, background, employment history, and physical and intellectual capabilities. *See Turner*, 661 F.2d 1042-43. In addition, such employment must be a position within the claimant's community that the claimant realistically could secure with a diligent effort. *Id.* While the employer need not specifically place the claimant in an actual job, it must establish the precise nature, terms, and availability of the job opportunity. *Tarner*, 731 F.2d at 201; *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The presumption of total disability continues until the employer satisfies this burden.

The employer's vocational expert stated that claimant would be able to perform several categories of jobs and would have no loss of earning capacity. This counselor is highly qualified and his testimony was very thorough in describing claimant's restrictions and the types of jobs the claimant could perform, along with the general job market conditions. However, he did not establish the precise nature, terms and availability of the general job opportunities he described, as is required by the Act. I again emphasize that the employer is required to prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the claimant within the local community. *Williams v. Halter Marine Serv.*, 19 BRBS 248, 253 (1987); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981). General labor market surveys are not sufficient to meet this burden. *Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380, 384 (1983); *Kimmel v. Sun Shipbuilding & Dry Dock Co.*, 14 BRBS 412 (1981).

The most specific job opportunities presented by employer's vocational counselor is a listing of available jobs that appeared in a Louisville, Kentucky newspaper, the Courier Journal. This listing appears to be of general categories and not specific job listings, as the specifics of the employment opportunities are not listed. Additionally, the jobs shown by the employer must be in the claimant's "local community." *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981). Since the Courier Journal is published in Louisville, there is no evidence that these jobs are available in the Paducah, Kentucky area, which

is the area of the claimant's residence. I acknowledge that the evidence offered by the employer through his vocational counselor was thorough and compelling, but in its present form, it is insufficient to establish suitable alternate employment under the Act, because the jobs discussed by the expert are theoretical, and are not specific, actual jobs.

The employer argues that claimant has not attempted to look for other employment and is not motivated to do so. Notwithstanding, claimant's burden to show he has diligently sought employment does not arise until the employer has met its burden of establishing suitable alternate employment. Thus, I am compelled by the case law to find Mr. Newbern is entitled to continuing permanent total disability compensation under Section 8(a) of the Act.

I am required by the medical evidence and the case law to find the claimant remains totally disabled and that the disability is permanent in nature because Mr. Newbern has reached maximum medical improvement. I again stress that I reach this conclusion only because the employer has not, as yet, met its burden of proving suitable alternative employment within the meaning of the controlling case law. However, it is apparent from the record that Richard Newbern is capable of performing some light or moderate duty work and there is no question that he could obtain such work in the Paducah area if he diligently tried. Mr. Newbern testified that he is not able to work and has no incentive to work because of his depression. However, there is no current medical evidence in the record to support these allegations or that the depression is due to his work-related injury. I therefore strongly encourage the claimant to seek psychological treatment to either overcome his anxiety about returning to the work force or to establish that he is unable to do so because of his mental condition and that such condition is due to his work-related injury. While Mr. Newbern's total permanent disability compensation under the Act is continuing as of the date of this decision, the employer can obviously seek modification of this award of benefits under Section 22 of the Act as soon as it perfects its vocational evidence and is able to establish suitable alternative employment within the claimant's area.

Medical Expenses

Section 7(a) of the Act provides that an employer shall furnish medical and surgical treatment for an employee for such period as the nature of the injury or the process of recovery may require. Medical benefits are not compensation and are not time-barred under Section 13 of the Act. *See Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228, 230 (1984). To be entitled to medical benefits under Section 7, a claimant need not establish that the injury has caused a reduction in wage-earning capacity. Rather, a claimant need only establish that the injury is work-related. *See Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168, 174 (1984). Of course, any expense claimed by the employee must be both reasonable and necessary.

Claimant argues that his medical expenses have not all been paid by the employer. As of the date of the hearing, claimant alleges that only $20,481.69 of $35,877.00 of his medical bills has been paid. (ALJX 4). Claimant has submitted updated medical bills for the Pain Management Center and pharmacy bills. (CX F, CX G). The employer has not presented any evidence

regarding the payment of these bills. Dr. Reiss indicated that Mr. Newbern's continuing pain is a result of his injury with the employer. The physician also reviewed the medical bills and stated that the charges listed were related to claimant's injury at work. Dr. Bakhit stated that one-hundred percent of claimant's symptoms today are related to his work injury. As there is competent evidence that claimant's medical bills are a result of his injury and no evidence that these charges are not reasonable or necessary, I find the employer is responsible for the payment of the medical bills relating to Mr. Newbern's work-related accident.

Compensation

Mr. Newbern is entitled to temporary total disability under Section 8(b) of the Act from July 5, 1995, until he reached maximum medical improvement on February 11, 1997. After that date, claimant's injury became permanent, and he is entitled to permanent total disability compensation under Section 8(a) of the Act from February 11, 1997 and continuing for the extent of the disability. The parties have stipulated to an average weekly wage of $252.00 per week and all compensation is to be based on that amount. (ALJX 3, 4; Tr. 6-7). The employer is also required to pay Mr. Newbern's medical expenses for the work-related injury.

ORDER

Based on the above findings of fact and conclusions of law, IT IS HEREBY ORDERED that Richard Newbern is entitled to the compensation listed below as a result of the claim involved in this proceeding. The specific computations of the award and interest shall be administratively performed by the District Director.

1. Kentucky Marine Corporation shall pay to Richard Newbern temporary total disability compensation under Section 8(b) of the Act from July 5, 1995 to February 11, 1997 at the rate of $168.00 per week, which is 66 ⅔ percent of claimant's average weekly wage of $252.00.

2. Employer shall pay to Richard Newbern permanent total disability compensation under Section 8(a) of the Act from February 11, 1997 and during the continuance of the total disability at the rate of $168.00 per week, which is 66 ⅔ percent of claimant's average weekly wage of $252.00, with appropriate adjustments under Section 10(f) of the Act.

3. Credit shall also be given to Kentucky Marine Corporation for compensation previously paid to the claimant as a result of the July 5, 1995 work-related injury.

4. Kentucky Marine Corporation shall pay any outstanding medical bills of Mr. Newbern relating to the July 5, 1995 accident and shall continue to furnish reasonable, appropriate and necessary medical care and treatment for claimant's work-related injuries as required by Section 7 of the Act.

Interest shall be paid on all accrued benefits in accordance with the rate applicable under 28 U.S.C. § 1961, computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this decision with the district director.

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DONALD W. MOSSER
Administrative Law Judge